Can (Republican) Values be Defined by Law?

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On 9 December 2020, the French government presented an important legislative proposal that seeks to reaffirm « republican principles ». The project is worth being examined in some detail, as it encapsulates many of the recurring tensions in the French legal and political debate over pluralism and *vivre ensemble*. This is a cause for concern not only because of the ways in which it recasts a number of rights and freedoms, but also because of the strongly axiological program it conveys – one that may further reinforce ongoing tendencies to interpret a number of republican values in manners that alienate minorities religious and otherwise.

When the proposed bill was first announced by the President of the Republic Emmanuel Macron, it was described as a tool for combating various forms of “separatism”. The term was eventually dropped and Prime Minister Jean Castex later reframed the project as one that targets an allegedly well-identified enemy: radical Islam. The killing of high school teacher Samuel Paty in Conflans and that of three people in a catholic church in Nice in October 2020 only heightened the expectations over the bill as one that ought to enrich the panoply of tools for combating terrorism. After a couple of weeks of heated political debate during which the Government decided to dissolve three associations on the basis of their alleged links to radical Islam, the legislative project was officially presented as enabling to track down all forms of defiance towards republican values. Contextual elements pertaining to the legal and political French contemporary debate over *laïcité* are usefully recalled (1.) before some of the prominent provisions of the proposed bill are presented (2.).

Laïcité as a “response” to terrorism

The specificities of the French constitutional regime of *laïcité* are well-known. They have been acknowledged by the European Court of Human Rights – if not equally so by other international human rights bodies. They also raise a number of questions and criticisms from various foreign countries and commentators. Many however fail to grasp the depth and indeed complexities of *laïcité à la française*. Although a blog post certainly cannot suffice to address that very wide issue, it is important to underline that a liberal tradition of *laïcité* has indeed existed and nurtured much of the legal and political developments pertaining to the French way of dealing with religious freedom, separation of church and state and similar issues. The legal hermeneutics of *laïcité* were indeed essentially liberal throughout most of the 20th century. Article 1 of the 1905 law on the separation of churches and state affirms that the Republic *guarantees* the freedom to exercise their religion; and important legal landmarks have designed liberal normative frameworks for religious education, the public manifestation of religious practices etc. What did remain both strict in the understanding of *laïcité* and quite specific to France has been the insistence on

the religious neutrality of all incarnations of “the State” – be they public buildings or public agents (civil servants) who were consistently subjected to a prohibition to express or endorse any religious views or beliefs.

It is however equally true that, over the past 15 years or so, the political and legal understanding of *laïcité* has undergone important changes. The 2004 Act prohibiting students from wearing religious signs in public schools was certainly an important stepping stone in that perspective, as it reversed the prior legal state of affairs – one that had affirmed that the constitutional principle of *laïcité* did not require them, as private individuals, to be subjected to a rule of religious neutrality. Since then, the right to express religious beliefs, especially in clothing or other forms of physical appearance, had indeed been restricted in various ways: some schools have adopted rules requiring parents to refrain from expressing any religious belonging if they are to participate in school activities (comforted in that by an instruction by the Ministry of Education), some prominent judicial cases have culminated in courts upholding internal rules of companies or undertakings requiring all personnel to comply with religious neutrality in the workplace and, of course, the concealment of the face (ie. the *niqab*) has been prohibited in all public spaces. These legal developments are only the emerged part of a much larger shift in the political debates over *laïcité*, a principle that many actors seek to redefine as much more antinomic to religious freedom than it once was; some equate the principle of *laïcité* with that of religious neutrality of the public sphere while others seek to frame it as a legal device against all forms of religious accommodation. All these efforts coalesce in normative moves that repeatedly impact if not target Muslim communities in France – a situation that has become all the more problematic since 2015 and the multiplication of terrorist acts committed by individuals and organizations that claim to act in the name of Islam.

Against that context, the current legislative proposal can be read as the latest avatar of a tendency to relate *laïcité*, as the quintessential republican value, to issues that were once considered well beyond its scope or ambition, namely: the preservation of what brings people together in a society, in face of threats and challenges from all sizes and shapes from pacific forms of religious pluralism to terrorist attacks.

From religious neutrality to normative injunction

The proposed bill is extremely wide in scope and takes the shape of amendments to a number of pieces of legislation that are generally considered to be emblematic of the 3rd Republic’s legislative heritage and thus worshipped as emblematic of the “republican tradition”: the 1881 Act on freedom of expression, the 1882 Act on Education, the 1901 Act on the freedom of association, the 1905 Act on separation of Churches and State (it is somewhat paradoxical for a text that proclaims the reinforcement of republican values as its objective to in fact amend landmark pieces of legislation that are generally thought to epitomize the French republican tradition). Overall, however, the bill expresses a sort of tug of war between the normative intent to affirm values (and indeed, require from citizens that they adhere thereto) and to require neutrality. In that, it is emblematic of some of the complexities

of the contemporary politics of *laïcité*, which proclaim to elevate neutrality as a (pre)condition for complex societies (and as a guarantee for pluralism) but in fact fail to respect it as they tend to impose a specific axiological program.

Emblematic of the heightened insistence on neutrality is a first series of provisions of the bill that extend the requirement of religious neutrality in the workplace well beyond the public sphere to which it had essentially been contained until now. Neutrality of all those who work in public services has long been a fundamental operative principle in France that applies to public schools, hospitals, administrations etc. However, until now it only applied to public agents *qua* public agents. In 2013, this rule had already been extended to employees of private undertakings if and when they were endowed with a mission of public service. The proposed bill seeks to generalize, systematize and indeed extend the scope of this judicial finding. It further extends requirements of religious neutrality in the workplace to all employees of companies who are contractors of public services. Concretely, this means for instance that catering companies for public schools, or cleaning services companies for universities or municipal buildings, could require all cooks, drivers, delivery personnel (…) to be subjected to a rule of religious neutrality. More incisively still, the bill projects to create a possibility for local representatives of the government (*préfets*) to seek emergency interim rulings suspending local decisions by municipalities or departments that they consider jeopardize the neutrality of public services. From several interviews and public statements by government members, it can be inferred that this provision typically seeks to equip public authorities with legal means of opposing practices such as the setting aside of specific time slots where public swimming pools, for instance, would be open only to women – for it is feared that such accommodations are emblematic of creeping forms of communautarianism.

Conversely, a second series of provisions that amend the legal regime applicable to associations requires the affirmation of adherence to values. In particular, the bill requires all associations who perceive public grants or subsidies to sign a "contract of republican commitment" (*contrat d'engagement républicain*) by which they pledge to respect the principles of liberty, equality (especially between men and women), fraternity, human dignity and the public order. Interestingly, the principle of *laïcité* is not listed among the republican principles that associations would now be asked to conform to. To be sure, this would have been impossible with respect to a number of associations, including several of national importance, that are indeed of confessional obedience. The foreseen *contrat d'engagement républicain* remains problematic nonetheless. It might well be indeed that some associations that define themselves as opposed to or agnostic vis-à-vis republican values would be reluctant if not opposed to signing such a contract. Associations of monarchist or anarchist obedience, for instance, would certainly be irked by such a requirement. At a deeper level, it could also be argued that the very fact of subjecting public funding to such a contractual pledge amounts to severely curtailing freedom of association. In a context in which a recent report has precisely documented both the diminution of public funding (and therefore the increased competition for its obtainment) and a tendency of public authorities to condition their funding on political loyalty, such a curtailment of the freedom of association appears highly worrisome to some.

The proposed bill also alters the legal regime of homeschooling. Although very marginal in French social practices, homeschooling has always been a legally protected option ever since one of the great laws on education of the late 1880s; it was only subjected to an obligation for parents to declare their choice to homeschool their children to administrative authorities, who in turn were to control that instruction was indeed delivered and that the rights and interests of the children were preserved. By contrast, the proposed bill subjects the option of homeschooling to prior authorization by administrative authorities; it further specifies that such authorization can only be granted with respect to a limited number of considerations (such as intensive sports or artistic practices and commitments) *to the exclusion of political, philosophical or religious considerations*. These provisions can therefore be read as seeking to prevent or oppose any individual or familial choice to opt-out of the default republican frame for religious reasons.

These provisions and others are to be read in parallel to the affirmation, in the bill's introduction, that all citizens ought to *adhere* to republican values. In that, the bill is topical of contemporary anxieties vis-à-vis the pluralism that characterizes society, religiously and otherwise. For indeed, when citizens are asked no longer to merely respect the law but also to adhere to the values that undergird it, the very modalities of the "living together" that brings society together are redefined in the form of a normative program that raises questions with respect to its inclusiveness.
